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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

OMAR RODRIGUEZ; CINDY GUILLEN-
GOMEZ; STEVE KARAGIOSIAN;
ELFEGO RODRIGUEZ; AND JAMAL
CHILDS,

Plaintiffs,

-vs-

BURBANK POLICE DEPARTMENT; CITY
OF BURBANK; AND DOES 1 THROUGH
100, INCLUSIVE.

Defendants.

CASE NO.: BC 414 602

Assigned to: Hon. Joanne B. O'Donnell, Judge
Dept. 37

Complaint Filed: May 28, 2009

PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION *IN LIMINE* NO. 5
FOR AN ORDER EXCLUDING EVIDENCE
OF OR ARGUMENT RE: ALLEGED
PROFILING OF ARMENIAN CITIZENS OR
SUSPECTS

Final Status Conference:

DATE: June 8, 2011
TIME: 9:00 a.m.
DEPT: 37

Trial Date: June 8, 2011

BURBANK POLICE DEPARTMENT; CITY
OF BURBANK,

Cross-Complainants,

-vs-

OMAR RODRIGUEZ, and Individual,

Cross- Defendant.

1 PLAINTIFF STEVE KARAGIOSIAN ("PLAINTIFF" or "KARAGIOSIAN") PLAINTIFF STEVE
2 KARAGIOSIAN HEREBY OPPOSES Defendant's Motion in Limine No. 5 to exclude all evidence
3 of Burbank Police officers' profiling of Armenian suspects and citizens on the following grounds.
4

5 Defendant's Motion in *Limine* No. 5 to exclude "evidence [and argument] of alleged ethnic
6 profiling of Armenian citizens by Burbank Police officer . . ." (Motion in Limine No. 6 at 2:7-8) is
7 based upon a faulty understanding of the remaining issues of the case, as well as a lack of
8 understanding of such evidence's evidentiary value.

9 The Memorandum of Points and Authorities incorrectly opens with, "Plaintiff's only
10 remaining claim against Burbank is for harassment . . ." However, the Court's Ruling on the
11 Summary Judgment Motion makes it abundantly clear that the following three issues remain:
12 harassment, failure to take reasonable steps to prevent and correct harassing behavior, and injunctive
13 relief. Thus the two claims before the jury in this case are both harassment and failure to prevent. In
14 addition, the evidence Defendant seeks to exclude, as explained below, is relevant to a determination
15 of whether the City of Burbank took reasonable steps to prevent the harassment of Armenians, as
16 well as the "totality of circumstances" necessary to determine whether or not Plaintiff suffered a
17 hostile work environment.

18 Defendant, itself, placed it's failure to prevent harassment at issue in its Answer to the First
19 Amended Complaint when it asserted the "avoidable consequences" doctrine as its Second
20 Affirmative Defense, alleging:

21 "The employer took reasonable steps to prevent and correct workplace harassment, but
22 Plaintiff(s) unreasonably failed to use the preventative and corrective measures provided by
23 the employer and reasonable use of the employer's procedures would have prevented at least
some, if not all, of the harm Plaintiff(s) allege she or he purportedly suffered.
(Answer to First Amended Complaint, p.2, ll.11-15.)"

24 Defendant's Second Affirmative Defense places in issue previous acts of discrimination, harassment
25 and retaliation, whether directed toward Plaintiff or others, and Defendant's responses thereto. *State*
26 *Dept. of Health Services v. Superior Court* (2003) 31 Cal. 4th 1026.

27 ///

28 ///

1 **A. Defendant's Answer Placed at Issue All Acts of Harassment, Discrimination and**
2 **Retaliation of Any Protected Group, as Well as the Efforts Taken by Defendant to**
3 **Prevent and Correct Such Conduct.**

4 Defendant's Answer places at issue previous acts of discrimination, harassment and
5 retaliation, whether directed toward Karagiosian or others, and Defendant's responses thereto. In
6 *State Dept. of Health Services v. Superior Court* (2003) 31 Cal. 4th 1026, the court explained:

7 "[T]o take advantage of the avoidable consequences defense, the employer ordinarily should
8 be prepared to show that it has adopted appropriate antiharassment policies . . . In a
9 particular case, **the trier of fact may appropriately consider** whether the employer
10 prohibited retaliation for reporting violations, whether the employer's reporting and
11 enforcement procedures protect employee confidentiality to the extent practical, and **whether**
12 **the employer consistently and firmly enforced the policy.** Evidence potentially relevant to
13 the avoidable consequences defense includes **anything** tending to show that the employer
14 took effective steps "to encourage victims to come forward with complaints of unwelcome
sexual conduct and to respond effectively to their complaints." (Grossman, *The First Bite Is*
Free: Employer Liability for Sexual Harassment (2000) 61 U.Pitt. L.Rev. 671, 696.) "[I]f an
employer has failed to investigate harassment complaints, [or] act on findings of
harassment, or, worse still, [has] retaliated against complainants, future victims will
have a strong argument that the policy and grievance procedure did not provide a
'reasonable avenue' for their complaints." (Id. at p. 699.)
(*State Dept. of Health Services, supra*, at pp.1045-1046.)

15 The court continued:

16 "A conscientious employer will quickly stop the misconduct of which it becomes aware.
17 Prompt employer intervention not only minimizes injury to the victim, but also sends a clear
18 message throughout the workplace that harassing conduct is not tolerated. Employers who
take seriously their **legal obligation** to prevent harassment are an employee's best protection
against workplace harassment." (*Id.* at p.1049, emphasis added.)

19 Thus, under *State Dept. of Health Services*, "the trier of fact may appropriately consider"
20 previous acts of harassment directed both at Plaintiff **and at others**, and Defendant's responses
21 thereto.

22 If "[e]vidence potentially relevant to the avoidable consequences defense includes **anything**
23 tending to show that the employer took effective steps 'to encourage victims to come forward with
24 complaints of unwelcome sexual conduct and to respond effectively to their complaints,'" then it
25 follows that relevant evidence also includes **anything** that shows that the employer failed "to
26 encourage victims to come forward with complaints of unwelcome sexual conduct and to respond
27 effectively to their complaints." This includes evidence of previous acts of harassment toward
28 Plaintiff **and others** and Defendants responses thereto.

1 Further, one of the policies behind FEHA is to deter future harassment by the same offender
2 or others by prompt effective action. In *Doe v. Starbucks, Inc.* (C.D. Cal. Dec. 18, 2009) 2009 U.S.
3 Dist. LEXIS 118878, the court explained:

4 "Section 12940(k) requires that an employer take all reasonable steps necessary to prevent
5 harassment. In an analogous Title VII situation, the Ninth Circuit has held that "[o]nce an
6 employer knows or should know of harassment, a remedial obligation kicks in. That
7 obligation will not be discharged until action - prompt, effective action - has been taken.
8 Effectiveness will be measured by the twin purposes of ending the current harassment and
9 deterring future harassment - **by the same offender or others.**" *Fuller v. City of Oakland*, 47
10 F.3d 1522, 1528 (9th Cir. 1995) (citations omitted). "The affirmative and mandatory duty to
11 ensure a discrimination-free work environment requires the employer to conduct a prompt
12 investigation of a discrimination claim." *Am. Airlines, Inc. v. Superior Court*, 114 Cal. App.
13 4th 881, 890, 8 Cal. Rptr. 3d 146 (2003), reh'g denied and review denied 2004 Cal. App.
14 LEXIS 147 (2004)."
15 (*Doe v. Starbucks, Inc.*, *supra*, at pp. 34-35, emphasis added.)

16 This policy to deter future harassment, by the same offender or others by prompt effective
17 action, places in issue whether past instances of harassment, whether directed toward plaintiff or
18 others, were met with prompt effective action. "Inaction constitutes a ratification of past harassment,
19 even if such harassment independently ceases. (citations)" *McGinest v. GTE Service Corp.*, *supra*, at
20 360 F.3d 1120. Such evidence of the employer's efforts to broadly address harassment when it
21 knows or has reason to know of its existence is highly probative, particularly when the harassment
22 stems from co-workers as opposed to supervisors and managers. *Nichols v. Azteca Rest. Enters.*, (9th
23 Cir. 2001) 256 F.3d 864, 875-876 ("When the employer undertakes no remedy, or where the remedy
24 does not end the current harassment and deter future harassment, liability attaches for both the past
25 harassment and any future harassment.")

26 Thus, instances of past harassment directed toward individuals other than Plaintiff, and
27 Defendant's responses thereto, are admissible.

28 **B. Defendant Seeks to "Sanitize" the Environment in Order to Prevent Proper Analysis of
the Totality of Circumstances Affecting Karagiosian's Work Environment.**

At the heart of this trial will be a determination of whether or not the harassment of
Karagiosian was severe and pervasive. Absent an adverse employment action, a claim of harassment
must be supported by evidence of a "hostile work environment." In order to prove a claim of
harassment, the plaintiff must show "a concerted pattern of harassment of a repeated, routine or
generalized nature" which created an "unreasonably abusive or offensive work-related environment

1 or adversely affected the reasonable employee's ability to do his . . . job." *Davis v. Monsanto*
2 *Chemical Co.* (1988 6th Cir.) 858 F.2d 345, 350; see also *Walker v. Meuller Industries, Inc.*.

3 **C. California Judicial Council Jury Instructions and Supporting Case Law Acknowledge**
4 **that Harassment Witnessed by the Plaintiff Though Directed at Others Is Relevant to**
5 **Both (1) Plaintiff's Harassment Claim and (2) His Claim that Defendant Failed to**
6 **Prevent and Correct Harassment in the Workplace.**

7 This concept has been fully embraced by California courts. It is expressly set forth in the
8 current CACI Series 2500 (Fair Employment and Housing Act) jury instructions juror consideration
9 of harassment directed at others. Instruction No. 1-2500 CACI 2521B states in relevant part:

10 "2. That [name of plaintiff], although not personally subjected to unwanted harassing conduct,
11 personally witnessed harassing conduct that took place in [his/her] immediate work environment.

12 6. [Select applicable basis of defendant's liability:]

13 [That a supervisor engaged in the conduct;] or

14 [That [name of defendant] [or [his/her/its] supervisors or agents] knew or should have known
of the conduct and failed to take immediate and appropriate corrective action.;]

8. That the conduct was a substantial factor in causing [name of plaintiff]'s harm."

15 In the Judicial Council's discussion of this specific instruction, it relies upon various provisions of
16 the Fair Employment and Housing Act (Gov. Code §§12926 et seq.), as well as the following case
17 law: *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519-520 (expressly discusses
18 harassing conduct witnessed by the plaintiff but directed at others), *Lyle v. Warner Brothers*
19 *Television Productions* (2006) 38 Cal.4th 264, 284-285 (discusses harassing conduct witnessed by
20 the plaintiff but directed at others); *Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 456, 464-465
21 ("severe or pervasive" standard applies to harassment of any protected class, as well as sexual
22 harassment).

23 Moreover, the *Lyle* case discusses the weight that should be given to harassment witnessed by
24 the plaintiff but directed at others. *Lyle, supra*, at 284-285. While harassment directed at others is
25 afforded less weight than harassment directed at the plaintiff, all such conduct is admissible and
26 allows the jury to assess the totality of circumstances of the plaintiff's work environment.

27 Defendant asserts that there is no evidence that Karagiosian witnessed any profiling or
28 mistreatment of Armenian suspects, witnesses or citizens. Defendant offers no basis for this
assertion. Motion in Limine No. 5 at 3:16-17. Plaintiff has every right to testify as to conduct

1 observed by him that affected his working environment.

2 Moreover, as discussed above, Karagiosian's personal knowledge of such harassment is
3 irrelevant to whether Defendant took all reasonable steps to prevent and correct harassment of others.
4 Evidence of the racial profiling of Armenian citizens alone does not create a hostile work
5 environment, however, such evidence is certainly probative of Defendant's efforts to identify, correct
6 and prevent harassment at the workplace.

7 **D. Federal Courts Also Acknowledge that Harassment of Other Protected Groups in**
8 **Addition to the Harassment of a Plaintiff Can Contributes to the Existence of a Hostile**
9 **Work Environment.**

10 The issue of harassment of members of protected groups other than those to which the
11 plaintiff belongs has not been addressed by California courts. However, federal courts have
12 recognized that a working environment heavily charged with ethnic or racial discrimination violates
13 both Title VII and FEHA. *Meritor Sav. Bank, FSB v. Vinson* (1986) 477 US 57, 66.

14 A hostile environment may exist even if some of the hostility is directed at other workers. In
15 *Cruz v. Coach Stores, Inc.* (2d Cir. 2000) 202 F.3d 560, 579, the court recognized that slurs directed
16 at both Hispanics and African-Americans could create a hostile work environment. In that case.

17 "Determining whether workplace harassment was severe or pervasive enough to be
18 actionable depends on the *totality of the circumstances*. Because the crucial inquiry focuses
19 on the nature of the workplace environment as a whole, *a plaintiff who herself experiences*
discriminatory harassment need not be the target of other instances of hostility in order for
those incidents to support her claim." *Cruz*, supra at 570.

20 The court considered the Human Resources Manager's repeated references to "niggers," and
21 comments such as "colored people's time," as well as comments concerning the plaintiff's protected
22 class as relevant and supportive of her claim of a hostile work environment. *Cruz*, supra at 571.

23 While there are few, if any, cases which address whether a cause of action for sexual
24 harassment based on hostile work environment may lie when *none* of the harassment is directed
25 towards the plaintiff, harassment of multiple protected classes, including the class to which the
26 plaintiff belongs, is relevant to the totality of circumstances which create the working environment.
27 In *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1117, an African-American
28 employee offered considerable evidence of years of harassment directed at him personally. In

1 addition, the court also deemed the harassment of his white friend because of their friendship a
2 contributing factor to the creation of the plaintiff's hostile work environment.

3 **E. Conclusion.**

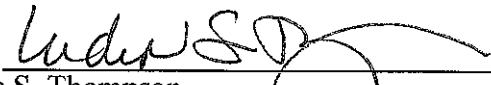
4 In sum, the evidence and argument which Defendant seeks to exclude is, ironically, relevant
5 and material to its own Second Affirmative Defense. The efficiency, or lack thereof, of management
6 action in addressing acts of discrimination, retaliation and harassment against *anyone* in the
7 protected group is relevant to Defendant's "avoidable consequences" defense. Moreover,
8 Karagiosian's observations of the harassment of Armenian suspects, witnesses and citizens is part of,
9 and material to, the "totality of circumstances" of Karagiosian's working environment, the core issue
10 to be determined in a hostile environment case such as this case.

11 For all of the foregoing reasons, Plaintiff respectfully requests that the court deny
12 Defendant's Motion in Limine No. 5 in its entirety.

13
14 DATED: May 25, 2011

Respectfully submitted,

15 LAW OFFICES OF RHEUBAN & GRESEN

16
17 By: 
18 India S. Thompson
Attorneys for Plaintiff, Steve Karagosian